DATE: December 17, 1996

In the Matter of:

RUSSIAN VILLAGE RESTAURANT

Employer

On Behalf of:

VAHE BABAYAN CASE NO.: 94-INA-00384
JULIETTE E. OSIPOVA CASE NO.: 94-INA-00385
Aliens

Appearance: Vartkes Yeghiayan, Esq.
For the Employer

Before: Huddleston, Vittone, and Wood
Administrative Law Judges

PAMELA LAKES WOOD
Administrative Law Judge

DECISION AND ORDER

The above actions arise upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of labor certification applications. The applications were submitted by the Employer on behalf of the above named Aliens pursuant to § 212 (a)(14) of the Immigration and Nationality Act of 1990, 8 U.S.C. § 1182(a)(14) (1990) ("Act"). The certification of aliens for permanent employment is governed by § 212 (a)(5)(A) of the Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212 (a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the records upon which the CO denied certification and the Employer's requests for review, as contained in two Appeal Files ("AF"), and any written argument of the parties. 20 C.F.R. § 656.27(c).

These cases have been consolidated for decision as the job opportunities being offered are identical, for the same employer, with the same evidence, and with the same application dates. References are to the same page numbers in both appeal files, unless otherwise indicated.

Statement of the Case

On April 16, 1993, Russian Village Restaurant ("Employer") filed applications for labor certification to enable Vahe Babayan and Juliette E. Osipova ("Aliens") to fill two positions of Russian/Georgian Cook (AF 25-26). The job duties for the position in connection with Vahe Babayan's application, as amended in June 1, 1993, were described as:

> Prepare and cook Russian/Georgian dinners, desserts, etc. in according [sic] to the recipes. Portion and garnish food in accordance to prescribed method. Develop procedures and methods to expeditiously prepare requisite dishes. Able to create new dishes from own recipes. The Restaurant is open Tuesday through Sunday from 11:00 A.M. - 12:00 P.M. with seating capacity of 180, a turnover of two tines [sic] lunch and one time dinner.

(AF 27). Substantially the same language appears in Juliette Osipova's application. (AF 27). The sole requirement listed for both Aliens was four years of experience in the offered positions. (AF 25-26).

The CO issued two separate Notices of Findings ("NOFs") on October 6, 1993 (AF 21-23), proposing to deny certification on the grounds that there is a nonexistent job opening and an inaccurate description of the job offer. Specifically, the CO found that even though the Employer petitioned to fill Russian/Georgian specialty cook positions, a review of the Employer's menu does not document that Georgian cooking is offered by the Employer's restaurant, but rather the menu emphasizes Armenian specialty dishes. The CO thus concluded there was no full time position requiring Georgian specialty cooking. Additionally, the CO found the Employer's assertion of 40 hours of work per week was inaccurate given the Employer's statement of hours

as 2:00 p.m. to 6:00 p.m. and 7:00 p.m. to 10:00 p.m., which equals seven hours per day. The CO stated that this discrepancy between the statement of total hours per week and the work schedule indicates an inaccurate description of the job offer.

Accordingly, the Employer was notified that it had until November 10, 1993, to rebut the findings or to cure the defects noted. (AF 21).

The Employer submitted its rebuttals dated November 2, 1993 and November 9, 1993, respectively. (AF 15-20). The Employer contended that the reason the menu did not reflect Georgian dishes is that they are "Specials of the Day," and are explained to customers by the waiters. Employer also stated that when the new menus are printed, the "Specials of the Day" will be on the menu because of their popularity. In response to the CO's finding regarding the hours of work, the Employer contended that the work hours are 2:00 p.m. to 10:00 p.m., with one hour, from 6:00 p.m. to 7:00 p.m., for lunch. The Employer stated that the Aliens will be paid for 40 hours, but will actually work 35 hours and the one-hour lunch break will be paid.

The CO issued the Final Determinations on November 12, 1993 and November 15, 1993, respectively (AF 12-14), denying certification based on the CO's finding that the Employer remained in violation of the regulations at 20 C.F.R. § 656.3 (formerly § 656.50), and the Employer's rebuttal failed to comply with the requirements of the NOFs. The CO stated that the Employer has failed to provide convincing documentation that a U.S. worker can be referred to an actual full-time position requiring Georgian Specialty cooking.

On December 9, 1993, the Employer requested reconsideration of the Final Determinations (AF 6-11), and attached copies of the new menu which includes some Georgian food items. The CO denied reconsideration on December 14, 1993 (AF 4-5), because the reconsideration request relies on evidence not submitted with the rebuttal and such information cannot be considered "at this phase of the proceeding." On January 10, 1994, the Employer submitted an Appeal to the CO's denial of the Motion to Reconsider (AF 1-3), and in April 1994, the CO forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board").

Discussion

Under ***Gencorp***, 87-INA-659 (Jan. 13, 1988) (***en banc***), ***Greg Kare***, 89-INA-7 (Dec. 18, 1989), and ***Joanne and David Fields***, 91-INA-2 (Nov. 23, 1992), written assertions that are reasonably specific and indicate their source or bases constitute documentation that must be considered. While the CO is not required to accept such documentation, it must consider it and give it the weight it rationally deserves, ***Gencorp, supra***.

Here, the documentation provided by the Employer in rebuttal is unrefuted and satisfies the ***Gencorp*** rule. This documentation includes a Russian Village menu listing Russian specialities accompanied by a statement from the restaurant's owner to the effect that Georgian dishes ("beef

keeward, lamb, khinkali and khachapouri") are currently daily "specials" explained by the waiter and, due to their popularity, will be listed when the menu is revised (AF 19-20). This statement is unrefuted. The CO's assertion that the menu emphasizes Armenian specialty dishes (AF 17) is both unsupported by the record and beside the point. Although "Zharkoe (Armenian Style)" and "Armenian coffee" are included, so too are such well known Russian dishes as Borscht, Chicken Kiev, and Beef Stroganoff. (AF 29). Moreover, the restaurant's name is consistent with an emphasis on Russian dishes, whether originating in Armenia, Georgia, or any other of the former Soviet Union's constituent republics, and the inclusion of Armenian dishes on the menu does not refute the need for a "Russian/Georgian specialty cook," who could be called upon to prepare other Russian dishes.

This case is very similar to ***H.R. Enterprises, Inc.,*** 89-INA-279 (June 2, 1990). In that case, the CO questioned whether there was a bona fide job opportunity for the position of Argentinean chef when the employer was unable to submit menus reflecting Argentinean items but, instead, stated that it planned to expand its current operation by opening new outlets and, based on a recent sojourn by its owner to South America, had decided to introduce Argentinean dishes. The Board reversed the CO, noting that the employer had made a reasonable showing that it was undergoing a significant expansion and wished to serve Argentinean cuisine.

Here, as in ***H.R. Enterprises***, the Employer has made a reasonable showing of the need for a specialty cook. The CO has asserted no cogent basis for rejecting the Employer's unrefuted statements and has merely found them to be "not convincing." Accordingly, the Employer's application for labor certification for these two employees should be granted.

ORDER

The Certifying Officer's denial of labor certification is hereby **REVERSED** and the Certifying Officer is directed to grant the Employer's applications for labor certification.

For the Panel:

Pamela L. Wood
Administrative Law Judge

Judge Richard E. Huddleston, dissenting:

Because I would find that the Employer has not made a showing of the existence of two permanent, full-time positions, I respectfully dissent.

Section 656.3 requires that the employer's offered position be both permanent and full-time. The employer bears the burden of proving that a position is permanent and full-time. If the

employer's own evidence does not show that the position is permanent and full-time, certification may be denied. ***Gerata Systems America, Inc.,*** 88-INA-344 (Dec. 16, 1988).

In the NOFs, the CO's "Corrective Action Required" was for the Employer to "[s]ubmit rebuttal documenting that an unfilled job opening currently exists for a full time Russian/ Georgian specialty cook" (AF 22). In rebuttal, the Employer provided only its own statements that full-time permanent positions exist, and that Georgian dishes are daily specials which are not included in the menu, but will be included upon reprinting of the menu. (AF 19-20).

The CO is not required to accept written statements provided in lieu of independent documentation as credible or true, but must consider them and give them the weight they rationally deserve. ***Gencorp,*** 87-INA-659 (Jan. 13, 1988) (***en banc***). The Employer's counsel cites ***Barton Beers, LTD,*** 90-INA-356 (Aug. 14, 1992) and ***Joanne and David Fields,*** 91-INA-2 (Nov. 23, 1992), for the proposition that "descriptive statements submitted by the employer which are reasonably specific and indicate their sources should be considered sufficient documentation" (AF 3). While I agree with the proposition, those two cases did not concern the issue of permanent full-time employment, and the employers in those cases provided lengthy and detailed statements addressing the issues in question. Here, the Employer's brief unspecific rebuttal statements simply fail to provide enough information to be considered sufficient documentation. A bare assertion without supporting evidence is generally insufficient to carry an employer's burden of proof. ***Our Lady of Guadalupe School,*** 88-INA-313 (June 2, 1989).

The CO's request for documentation that a full-time permanent position exists is unspecific and broad, and the Employer's rebuttal must then also be measured broadly. See ***Agora Realty, Inc.,*** 89-INA-3 (Oct. 16, 1989). Even measuring the Employer's response broadly, it is insufficient to carry its burden of proof. The Employer seeks to hire two full-time Russian/Georgian Specialty cooks, but the Employer's brief rebuttal simply does not provide enough information to show two full-time positions exist. How has the preparation of these Georgian dishes been accomplished in the past? Are these positions available in an effort to increase business, or simply to maintain the business at existing levels? While the CO's request for documentation could have been more specific, the Employer's responses in rebuttal are merely unsupported assertions, and cannot carry its burden of poof. See ***Our Lady of Guadalupe School, supra.***

The Employer's new menu cannot be considered determinative, because it was submitted after the Final Determination, and new evidence cannot be considered on appeal. ***Universal Energy Systems, Inc.,*** 88-INA-5 (Jan. 4, 1989); ***Wirtz Manufacturing Co.,*** 88-INA-63 (Jan. 13, 1989). Even if the new menu could be considered, it does not list all of the Georgian dishes named in rebuttal, which the Employer claimed were daily specials that would be incorporated into a new menu upon printing (AF 16-17). In addition, the menu does not mention that the restaurant features or specializes in Georgian-style cooking or specific Georgian dishes (AF 11).

Accordingly, I would deny the Employer's applications for labor certification.

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decision, or (2) when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400
Washington, DC 20001-8002.

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.